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IN THE

Supreme Court of the United States

October Term, 1958

No. 696

ANONYMOUS (NO. 1),

Petitioner,

versus

HON. WALTER R. HART, a Justice of the Supreme Court of the State of New York; HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, and DENIS M. HURLEY, counsel for the Judicial Inquiry,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE RELIEF SOUGHT BY PETITIONER

and

THE DECISIONS BELOW

In our Statement of the Case, *infra*, we shall recite the material facts and the sequence of the extensive litigation in the State Courts;—involving in the ultimate nothing more than a claim by petitioner that he has a constitutional right to have his motion to quash a certain subpoena determined at a particular *part* or *term* of the Supreme Court of the State of New York different than the *part* or *term* of the Supreme Court designated therefor by the Appellate Division of the Supreme Court.

We point out here that petitioner's motion to quash the subpoena has never reached the stage of determination on the merits. The maze of litigation thus far has centered solely on a preliminary procedural question as to the proper judicial forum to decide petitioner's motion.

During the course of the litigation the Appellate Division rendered an opinion herein (6 App. Div. 2d 723) that the motion to quash the subpoena should be addressed to the "Additional Special Term of the Supreme Court" which had been theretofore appointed or designated by the Appellate Division. Alleging that such direction of the Appellate Division was an invasion of his rights under the due process clause of the Fourteenth Amendment, petitioner instituted a proceeding under Article 78 of the Civil Practice Act of the State of New York. The relief sought by petitioner in that proceeding was an order directing the Hon. Walter R. Hart as a Justice of the Supreme Court, Kings County, to render a decision upon petitioner's motion at a "Special Term, Part I of the Supreme Court, Kings County, upon the ground that the said duty is specially enjoined by law upon the respondent." By decision (6 App. Div. 2d 894) and order entered thereon, dated July 21 1958, petitioner's application and petition in the Article 78 proceeding were unanimously dismissed. By order dated October 6, 1958, the Appellate Division denied leave to petitioner to appeal to the Court of Appeals (N. Y. Law Journal, October 7, 1958, p. 14, col. 4).

By order dated November 13, 1958, the Court of Appeals denied petitioner's motion for leave to appeal to that court (5 N. Y. 2d 708).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

The questions presented are:

(1) Under the circumstances of this case, is the petitioner possessed of any constitutional right to choose a particular term or part of the State Supreme Court to pass upon a motion to quash a subpoena? Is the petitioner denied either the equal protection of the laws or due process of law under the Fourteenth Amendment by a requirement of the Appellate Division that a motion to quash the subpoena here involved shall be addressed to the "Additional Special Term of the Supreme Court" appointed by the Appellate Division?

(2) Is the determination of the courts below a "final judgment" within the meaning of Title 28 U. S. C. § 1257(3)? In any event, does the case at this juncture present any constitutional question that is ripe for review by this court?

STATEMENT OF THE CASE

The judicial inquiry ordered by the Appellate Division; the relevant provisions of the order of the Appellate Division.

By order dated January 21, 1957, as amended by order dated February 11, 1957,* the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, directed that a judicial inquiry be directed

*The full text of the order and the amending order, designated Exhibits A and B, respectively, comprise part of the record of the Appellate Division herein.

with respect, *inter alia*, to alleged improper and unethical practices by attorneys and by persons acting in concert with them.

For the purpose of conducting the inquiry, the order provides for the appointment of "An Additional Special Term of the Supreme Court, in and for the County of Kings" and that "Mr. Justice George A. Arkwright," be and he hereby is assigned to hold such Additional Special Term." The order further provides for the appointment of Denis M. Hurley, Esq., an attorney designated by the Brooklyn Bar Association, to aid Mr. Justice Arkwright in the conduct of the inquiry.

Under the terms of the order, the justice presiding at the Additional Special Term is vested "with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records."

The subpoena issued to petitioner; the ensuing litigation.

By subpoena dated November 15, 1957, issued by the respondents Arkwright and Hurley, the petitioner, an attorney-at-law, was directed to appear with various of his records at an "Additional Special Term of the Supreme Court for the County of Kings" on November 20, 1957 (Exhibit W in the Record of the Appellate Division). The petitioner's appearance in response to the subpoena was adjourned several times at the request of his counsel. There followed the litigation which ultimately gave rise to the petitioner's instant application for a Writ of Certiorari. For purposes of convenient reference, we shall treat with the litigation in the courts below as Proceeding No. I

* By reason of attaining the statutory age limit, Mr. Justice Arkwright retired on December 31, 1958. In his place the Appellate Division has designated Supreme Court Justice Edward G. Baker to preside over the Additional Special Term.

and Proceeding No. II, respectively. The basic relief sought by petitioner in each proceeding was the same, namely, to vacate the aforesaid subpoena duces tecum. The question involved is also common to both proceedings. In what part of the Supreme Court shall the motion to vacate be returnable?

Proceeding No. I

The steps taken in sequence in this proceeding were:

(a) Petitioner's initial application was by order to show cause dated February 13, 1958, returnable in the Supreme Court of the Appellate Division, Second Department, for an order to vacate and set aside the subpoena duces tecum (Exhibit C in the Record of the Appellate Division). By cross-motion, the respondent Hurley moved to dismiss the petitioner's motion to vacate the subpoena, contending that such motion should have been addressed, in the first instance, to the Additional Special Term (Exhibit D in the Record of the Appellate Division).

(b) By decision and order, both dated March 5, 1958, the Appellate Division granted the cross motion and dismissed petitioner's motion to vacate the subpoena "without prejudice to his right, if so advised, to renew his motion in the Supreme Court". The court also noted that while it "undoubtedly possesses original jurisdiction to entertain and determine, in the first instance, any motion in an action or proceeding pending in the Supreme Court," the court concluded that "orderly procedure and the interests of justice would require that petitioner's application be made in the first instance to the Supreme Court." *Matter of Anonymous (No. 1)* v. *Hurley*, 5 App. Div. 2d 872.

(c) On March 10, 1958, in compliance with the aforesaid decision and order, the petitioner renewed his motion

at the Additional Special Term of the Supreme Court where the subpoena by its terms was returnable. During the pendency of the motion, petitioner applied to Mr. Justice Arkwright, presiding at the Additional Special Term, that he refer the motion to Special Term, Part I, of the Supreme Court. Although Mr. Justice Arkwright reserved decision on the application, the petitioner thereupon withdrew his pending motion and brought on another motion to vacate the subpoena. This motion was by order to show cause, dated March 22, 1958, returnable before the court presiding at "a Special Term, Part I, of the Supreme Court, Kings County" on April 1, 1958. Respondents Arkwright and Hurley then cross-moved at the same Special Term, Part I of the Supreme Court for an order referring petitioner's motion to vacate to the Additional Special Term. The cross-motion was argued before Mr. Justice Hart, presiding at the Special Term, Part I on April 7, 1958 (Exhibits H to M, inclusive, in Record of Appellate Division). By opinion dated April 28, 1958 and order entered thereon dated April 29, 1958, Mr. Justice Hart denied the cross-motion (Exhibits N and O in Record of the Appellate Division).

(d) Respondents then appealed to the Appellate Division, Second Department, from the said order of Mr. Justice Hart, and petitioner moved to dismiss respondents' appeal (Exhibits P to S, inclusive in Record of Appellate Division).

(e) In an opinion, and order entered thereon, both dated May 29, 1958, the Appellate Division dismissed respondents' appeal on the ground that since the orders appealed from "relate to a matter of procedure it may not be said that they affect any substantial right of appellants, and, hence, no appeal lies from such orders". *Matter of Anonymous (No. 1)* v. *Hurley*, 6 App. Div. 2d 723, 724. The Appellate Division then made clear its views that all motions affecting subpoenas or other process issued out of

the Additional Special Term were to be addressed to and made returnable before the justice presiding at the said Additional Special Term of the Supreme Court.

With reference to its prior decisions upon the subject dated March 5, 1958 (Appendix A hereof), the court went on to say that in relegating the parties to the Supreme Court "we failed to insert the qualifying words 'Additional Special Term of the' before the words 'Supreme Court'. To rectify this inadvertence the Appellate Division, on its own motion, corrected its prior decisions accordingly, *nunc pro tunc*, so that there would be no doubt "that the power to quash a subpoena issued out of the Additional Special Term is an incident of the exclusive powers vested in the said Additional Special Term by the order appointing it". We quote from the opinion of the Appellate Division:

> "* * * we deem it advisable to elaborate upon our views as to the proper practice with respect to motions affecting subpoenas or other process issued out of the said additional Special Term, and to correct an inadvertent error in our two prior decisions upon the subject (Matter of Anonymous No. 1 [Hurley], 5 App. Div. 2d 872; Matter of Anonymous No. 3 [Hurley], 5 App. Div. 2d 872). In those decisions we dismissed motions made in this court to quash subpoenas issued out of the said additional Special Term on the ground that this court, while it possessed jurisdiction, nevertheless would not entertain such motions in the first instance, and that such motions should be addressed to the 'Supreme Court.' Our intention, however, was to state that such motions should be addressed to the said additional Special Term of the Supreme Court. This court, by its order of January 21, 1957, appointed that additional Special Term. Under said order it was only that additional Special Term which was authorized to conduct this judicial inquiry 'with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records.' Inadvertently, however, in

our decisions of March 5, 1958, when we relegated the moving parties there to the Supreme Court, we failed to insert the qualifying words 'additional Special Term of the' before the words 'Supreme Court.' To rectify the inadvertence, this court on its own motion will correct its said decisions accordingly, nunc pro tunc. It is obvious that the power to quash a subpoena issued out of the additional Special Term is an incident of the exclusive powers vested in the said additional Special Term by the order appointing it. Therefore, it would be inappropriate and improper for a justice presiding at another Special Term to review the propriety of the action taken by the justice at the said additional Special Term or to attempt to annul or confirm any such action. By our prior decisions we never intended that such a result should eventuate."

Consistent with its opinion, the Appellate Division made an order on May 29, 1958 amending its prior opinion and order dated and entered March 5, 1958 (Exhibit V in the Record of the Appellate Division).

(f) Following the Appellate Division's opinion of May 29, 1958, the attorneys for the respective parties conferred with Mr. Justice Hart, who properly stated that in view of the said opinion and order entered thereon, the motion to quash the subpoenas was required to be referred to the Additional Special Term and petitioner was granted until June 23, 1958 to institute such proceedings as he may be advised "to challenge the legality of the said order of the Appellate Division dated May 29, 1958 amending its order and decision of March 5, 1958 *nunc pro tunc*" (Paragraphs 22 and 23 of petitioner's petition to Appellate Division in the Record of the Appellate Division).

Petitioner thereupon embarked on the institution of still another proceeding which we have designated as Proceeding No. II.

Proceeding No. II

Upon a petition verified June 18, 1958, petitioner instituted a proceeding under Article 78 of the Civil Practice Act in the Appellate Division for an order prohibiting the respondent, Mr. Justice Hart, from referring petitioner's motion to vacate the subpoena duces tecum to the Additional Special Term, and directing the said respondent to render a decision upon the said motion "upon the ground that the said duty is specially enjoined by law upon the respondent."* We here point out that although the petition is ostensibly in the nature of prohibition and mandamus, it is in reality a certiorari to review the determination and order of the Appellate Division made May 29, 1958 which was the culmination of "Proceeding No. I" above.**

By decision (6 App. Div. 2d 894) and order entered thereon, dated July 21, 1958, the Appellate Division unanimously denied petitioner's application and dismissed his petition in the Article 78 proceeding. By order dated October 6, 1958 the Appellate Division denied leave to petitioner to appeal to the Court of Appeals (N. Y. Law Journal, Oct. 7, 1958, p. 14, col. 4).

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* The petition with its voluminous exhibits comprises part of the Record of the Appellate Division herein.

** On June 24, 1958 petitioner moved in the Appellate Division, Second Judicial Department, to transfer the Article 78 Proceeding to an adjoining Judicial Department for hearing and determination. The motion was denied by unanimous order of the court dated July 21, 1958 (N. Y. Law Journal, July 22, 1958, p. 3, col. 3). By order dated October 6, 1958 the Appellate Division denied petitioner's motion for leave to appeal to the Court of Appeals (N. Y. Law Journal, October 7, 1958, p. 14, col. 4). No application was made by petitioner to the Court of Appeals for leave to appeal to that court. Thus, this feature of the controversy is not properly before this court in that the petitioner failed to exhaust the remedies available to him for review accorded by state procedure. *Matthews* v. *Huwe*, 269 U. S. 262, 265-266; *Stratton* v. *Stratton*, 239 U. S. 55.

By order dated November 13, 1958, the Court of Appeals denied petitioner's motion for leave to appeal to that court (5 N. Y. 2d 708).

There followed petitioner's application to this court for a Writ of Certiorari.

ARGUMENT

The constitutional question presented is neither substantial nor ripe for review by this Court.

(1)

The power of the Appellate Division to appoint the Additional Special Term.

Both by the provisions of the New York State Constitution and the Judiciary Law of the State of New York, the Appellate Division has been granted plenary power to regulate the holding of special terms of the Supreme Court and to assign the justices to preside over such terms. We quote from Article VI, § 2 of the New York State Constitution:

> "The justices of the appellate division in each department shall have the power to fix the times and places for holding special and trial terms of the supreme court held therein and to assign the justices in the departments to hold such terms; or to make rules therefor."

The above quoted provision in the State Constitution is repeated *haec verba* in Section 86 of the Judiciary Law.

To complement the foregoing, Section 83 of the Judiciary Law grants the Appellate Division "the power to adopt, amend or rescind any rule of civil practice not inconsistent with any statute; * * * to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice."

Thus, the Appellate Division's order of January 21, 1957, as amended, was a valid exercise of the power delegated to the Appellate Division to designate "an Additional Special Term of the Supreme Court" and to appoint the justice to preside over it. As an incident both of its own power and of the power of the Additional Special Term, the Appellate Division made clear in its opinion of May 29, 1958, pages 7, 8, *ante*, that motions to quash subpoenas issued out of the Additional Special Term should be addressed to the said Additional Special Term and not to any other special term of the Supreme Court. There is nothing at all unusual about such a procedure. Indeed, it is completely consonant with the procedure established by the Appellate Division as to other motions in special type proceedings. Thus, all applications in condemnation and tax certiorari proceedings are heard in Special Term, Part IV (Supreme Court, Kings County, Rule 20). Matrimonial matters are heard in Special Term, Part V (*Id.*, Rule 21, subd. a). Certain motions arising from incompetency proceedings are heard in Special Term, Part VI (*Id.*, Rule 22, subd. b).

So too with the Judicial Inquiry. It is a proceeding of a special type or nature. In the County of Kings there has not been such an inquiry or investigation since 1928. Just as the other special type proceedings illustrated above, by their very nature are returnable at a special term of the Supreme Court designated by the Appellate Division, so too has the Appellate Division in the exercise of its supervisory powers over the procedure and business of the Supreme Court, Kings County, deemed it administratively advisable to have motions affecting subpoenas issued by the Judicial Inquiry returnable at the Additional Special Term.

From all of the foregoing it is obvious to us that the decision as to which particular special term in the first instance shall decide the petitioner's motion to vacate the

subpoena and kindred motions rests solely in the province of the Appellate Division. Nor can it be logically argued that the Appellate Division has improvidently exercised its grant of power. Lines of authority so essential to the symmetry of our judicial system would be, dangerously short circuited if a judge sitting in one part of the Supreme Court could restrict, and even revoke, the action of another judge of equal and like authority, sitting in another part of the same court. *Beeber* v. *Empire Power Corp.*, 260 App. Div. 68, 69.

(2)

The litigation in the courts below was confined to procedural matters devoid of any substantial constitutional question; there is not the requisite finality for review by this court.

In the light of the foregoing, we turn to an analysis of our intentionally complete recital of the litigation in the state courts. This much is clear. All of the legal skirmishes, and indeed every facet of the litigation in the courts below, were confined to matters *procedural* in nature. In Proceeding No. I, referred to at page 5 *et seq. ante*, the objective of the petitioner was to obtain a determination of his motion to quash a subpoena in a term of the Supreme Court other than the Additional Special Term designated by the Appellate Division. His asserted constitutional right to have his motion determined at a different judicial forum than the Additional Special Term was unanimously rejected by the state courts. Nevertheless, in Proceeding No. II, referred to at page 9 *et seq. ante*, through the guise of an alleged mandamus or prohibition proceeding under Article 78 of the Civil Practice Act, he raised in substance the very *procedural* question that had already been determined adversely to him in Proceeding No. I. Accordingly, both the Appellate Division and the Court of Appeals of the State of New York unanimously rejected petitioner's contentions, without opinion. Implicit in the decisions of the state courts is the holding that petitioner's contentions are bereft of any constitutional prop because they deal only with matters of procedure.

From our discussion thus far, we deduce the proposition that in an appellate sense, the determinations and orders of the courts below are not final since they do not finally and completely determine the case or the substantive rights of the parties. Accordingly, on that ground alone, we submit that certiorari should be denied.

As was stated by this court in *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 546, in construing the "final judgment" requirement for certiorari,

> "It frequently has been said that for a judgment of an Appellate Court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties."

And such judgment, it has often been held, must be more than a determination of "merely interlocutory or intermediate steps." *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 551.

See also:

Republic National Gas Co. v. *Oklahoma*, 334 U. S. 62, 67-69;
Catlin v. *United States*, 324 U. S. 229, 233.

For a situation that is quite analogous to the case at bar, we respectfully refer the court to *Cobbledick* v. *United States*, 309 U. S. 323, 327, 328, wherein this court held that an order of a district court denying a motion to quash a subpoena duces tecum did not meet the test of "finality" requisite to review. See also *Alexander* v. *United States*, 201 U. S. 117, 121-122.

To the foregoing we would add that the jurisdiction and procedure of local courts is traditionally a matter of state policy with which this court declines to interfere.

Pacific Gas Co. v. *Police Court*, 251 U. S. 22, 24;
St. Louis Iron Mountain & Southern Railway Company v. *Taylor*, 210 U. S. 281, 285;

Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541, 551;
Kammerer v. *Koreger*, 299 U. S. 302, 304.

(3)

Petitioner's subsidiary contentions.

We need comment only briefly on some of the subsidiary contentions advanced by petitioner.

(a)

Petitioner's contention that the justice presiding over the Additional Special Term "was appointed investigator and prosecutor to conduct the Inquiry and also to adjudicate in a judicial capacity all matters in difference between himself as investigator and those persons appearing before him" (Petition, pp. 15, 16), is based upon a misconception of the facts and the law. Both under Section 90 of the Judiciary Law and under the order of the Appellate Division dated January 21, 1957, which was drawn in conformity with Section 90, the justice presiding at the Additional Special Term is not the prosecutor.

The cases cited by petitioner for the proposition that "to permit the Justice conducting the Judicial Inquiry to sit in review of his own act would constitute a denial of due process under the Fourteenth Amendment to the Federal Constitution" (Petition p. 16), are in no wise applicable to the proceeding at bar. Thus, we are not here concerned with a judge sitting as a trial justice over a complaint which he initiated while sitting as a "one-man grand jury," *Matter of Murchison*, 349 U. S. 133; or a party sitting as arbitrator in his own dispute, *Matter of Cross & Brown Co.*, 4 App. Div. 2d 501; or a judge hearing a motion alleging his own misconduct, *People ex rel. Todd* v. *Steinbrink*, 249 App. Div. 760. Rather, we are here concerned merely with an order of the Appellate Division whereby all proceedings in connection with the Judicial In-

quiry were remitted to the Additional Special Term, grounded upon the reasonable and time-honored rule that where a court has been granted jurisdiction over a particular matter it has jurisdiction over any incidental motions pertaining thereto.

(b)

Petitioner's reference to Section 19 of Article VI of the New York State Constitution (Petition, p. 17) is inapposite and unavailing. The intent of Article VI, Section 19 is apparent from a reading of former Section 3, the predecessor section, which forbade a judge to "sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member." (See *Duryea* v. *Traphagen*, 84 N. Y. 652; *Van Arsdale* v. *King*, 152 N. Y. 69, 71). Accordingly, Section 19 simply prohibits, for example, a Supreme Court justice, upon his promotion to the Appellate Division, to sit in review of one of his own decisions made by him while he was in the Supreme Court. It would also preclude a justice of the Appellate Division who was elevated to the Court of Appeals from sitting in review of a case in which he participated while a member of the Appellate Division.

We make the flat statement that in the case at bar there has been no contravention whatsoever of the above provision.

And as has been noted, page 5 *ante*, petitioner's motion in the Appellate Divisic : to vacate the subpoena duces tecum was dismissed because the Appellate Division refused to exercise its original jurisdiction in the matter and sit as a Special Term.

(c)

At pages 14 and 15 the petitioner is concerned lest any determination on the merits by the Additional Special Term of his motion to vacate the subpoena duces tecum would not be subject to review. Petitioner is inconsistent. He cites three cases (page 14) as authority for the proposition that

such an application to vacate a subpoena terminates in a final order from which an appeal may be taken as a matter of right. In any event, the short answer is that the petitioner is prematurely apprehensive and indulging in conjecture. Let the petitioner submit to a decision on the merits by the Additional Special Term and it will be time enough then to consider whether there has been any deprivation of petitioner's rights. *Parker* v. *County of Los Angeles*, 338 U. S. 327, 332. We observe also that "it is not impossible that the parties now complaining may be satisfied with the judgment which they may in the end be able to secure in the state courts." *Kimball* v. *Evans*, 93 U. S. 320, 321.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

March 10, 1959.

Respectfully submitted,

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